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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No. 94

WILLIAM RADOVICH,

Petitioner,

vs.

NATIONAL FOOTBALL LEAGUE, BERT BELL, J. RUFUS KLAWANS, BOSTON YANKS, NEW YORK RANGERS, NEW YORK GIANTS CLUB, PHILADELPHIA EAGLES, THE LOS ANGELES RAMS FOOTBALL CLUB, INC., PITTSBURGH STEELERS FOOTBALL CLUB, WASHINGTON REDSKINS, CHICAGO BEARS FOOTBALL CLUB, INC., CHICAGO CARDINALS FOOTBALL CLUB, DETROIT LIONS FOOTBALL CLUB, GREEN BAY PACKERS, SAN FRANCISCO CLIPPERS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S OPENING BRIEF.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S OPENING BRIEF.

I.

OPINIONS AND JUDGMENTS IN THE COURTS BELOW.

The Order of the District Court was filed April 30, 1954 (R. 64).

The Judgment of the District Court was entered September 17, 1954 (R. 69). Neither have been reported.

The Judgment of the Court of Appeals was entered March 27, 1956 (R. 77). The Opinion of the United States Court of Appeals for the Ninth Circuit was filed March 27, 1956 (R. 73), 231 Fed. 2d 620.

This Court granted petition for certiorari October 8, 1956 (R. 78).

II.

JURISDICTIONAL STATEMENT AND STATUTES INVOLVED.

(a) Statutes giving jurisdiction.

Plaintiff asserts that the defendants are in violation of the antitrust laws.

Sherman Act, Section 1, July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209, 15 U. S. Code, Sec. 1:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . ."

Section 2, Sherman Act, July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209, 15 U. S. Code, Sec. 2:

> "Section 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be

deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Petitioner brings his action under Section 4 of the Clayton Act. October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731, 15 U. S. Code, Sec. 15:

"Section 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The judgment of the United States Court of Appeals for the Ninth Circuit affirming the dismissal of plaintiff's complaint under said laws by the District Court was entered on March 27, 1956. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254 and 2101(c).

The statutes involved are set forth above.

III.

QUESTIONS PRESENTED.

1. Whether a combination of football clubs, corporations and partnerships, an association composed of said corporations and certain individuals alleged

to have perpetrated a boycott against petitioner which prevented him from playing or coaching football with the National Football League and others are exempt from the application of the Sherman Antitrust Act because football is a team sport?

2. Whether a complaint for injuries by a private party under Section 4 of the Clayton Act is sufficient if it states violations of the antitrust laws and injury thereby?

IV.

STATEMENT OF THE CASE.

Petitioner's complaint was filed under Section 4 of the Clayton Act, set forth above, against the National Football League, ten member clubs located in various cities in the United States, and two individuals alleged to be the Commissioners of the National Football League and the Pacific Coast League; and the San Francisco Clippers of the latter (R. 5-6).

It is alleged that the respondents through their association in the National Football League have monopolized, attempted to monopolize and contracted and conspired to monopolize, control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States (R. 9). These respondents, it is alleged, agreed to adopt a uniform player's contract. It contained clauses which "prevents a player from ever playing for any team other than his original employer unless the employer consents" (R. 10, 16). It is alleged

that these clubs, further, enforced these agreed upon player's contracts by agreeing that no club in the National League would hire a player who attempted to become in effect, a free agent, by violating the reserve clause (R. 10).

It is alleged that the respondents boycotted petitioner and prevented him from becoming a player-coach with the Pacific Coast League after he had played for a competitive football conference, the All America Conference (R. 14, 15). It is alleged that part of the agreement of these clubs was to boycott, and if possible, ruin the All America Conference so that the business of organized football would remain the monopoly of the National League (R. 14, 16). The complaint specifies that the petitioner was offered a job as a player-coach at the start of the 1948 season by William Howard, coach of the San Francisco Clippers of the Pacific Coast League, but that said job was refused after the National Football League sent blacklists throughout the country, blacklisting petitioner, and after having threatened severe penalties against the Pacific Coast League if it hired or employed petitioner (R. 15).

The complaint specified that petitioner was compelled by reason of the health of his father, who lived in Los Angeles, to play football in Los Angeles in order to be near him. Because of this, petitioner alleged he requested to play with a member of the National Football League, the Los Angeles Rams, in Los Angeles, but that this request was refused by the holder of his contract, Fred Mandel of the Detroit

Lions (R. 12-13). Petitioner then accepted an offer to play for the Los Angeles Dons, of the All America Conference (R. 12-15). After playing for this competitive football league, the blacklist and boycott and ban was alleged to have occurred (R. 15).

It is alleged that by reason of the violations of the antitrust laws, respondents eliminated petitioner from the game of organized football, suppressed competition, monopolized the business of organized football; eliminated competition among themselves, prevented new competition, sought to impair the competition of the All America Conference, and have placed football players in a condition of bondage (R. 16).

It is specifically alleged that the respondents did the things they agreed to do, as set forth (R. 10).

The allegations as to interstate commerce are set forth at R. 7-9. There it is alleged that the respondents arrange for the multistate transmission of football contests by television and broadcasting companies. Other factors of interstate commerce appear in the complaint. It is alleged that each of the ten members of the National Football League contributes $50,000 to it upon membership (R. 5); that football games are played throughout the United States, and that there is constant and continuous travel by the ball players and the managers between various cities in the United States (R. 7-8); that each team adopts uniform nationwide contracts which apply to all football players under their control (R. 10, 16).

The allegations of the respondents as to interstate commerce are in the cast and mold of *Federal Base-*

ball Club v. National League, 259 U. S. 200 (R. 24-28, 53). They aid the pleadings of the petitioner in admitting that they agree and enforce a uniform player's contract (R. 28-30, 33, 35, 54); that they agree to provide for a suspension for five years of any player who attempts to become a free agent (R. 30); that pursuant to National Football League Rules, petitioner was placed on an ineligible list for five years (R. 35); and that the All America Conference was in existence and attempting to set up a competitive conference operating in the cities of New York, Chicago, Los Angeles, San Francisco, Cleveland, Buffalo, Baltimore, Brooklyn and Miami (R. 45-46).

Respondents operated in New York, Philadelphia, Los Angeles, Pittsburgh, Washington, D.C., Chicago, Detroit and Green Bay, Wisconsin (R. 5-6, 21-23).

On motion to dismiss the complaint in the District Court by the respondents (R. 63), the District Court dismissed the complaint (R. 64), and entered judgment (R. 69). The basis for the dismissal was *Toolson v. New York Yankees,* 346 U. S. 356, and *Federal Baseball Club v. National League,* 259 U. S. 200. The judgment of the District Court was affirmed by the United States Court of Appeals for the Ninth Circuit (R. 77). It held that football is a team sport as is baseball and therefore reasonably entitled to exemption from the antitrust laws. It further concluded the complaint failed to establish that the public was adversely affected by its allegations. The decision did not purport to determine if the complaint alleged violations of the antitrust laws (R. 73-77).

V.

SUMMARY OF THE ARGUMENT.

Petitioner has stated a cause of action under the antitrust laws. Section 4 of the Clayton Act requires that a private party plead only that he be injured in his business or property by reasons of anything forbidden in the antitrust laws. Accordingly all that petitioner need allege is (1) a violation of the antitrust laws and (2) injury arising therefrom. A group boycott and ban are illegal per se. *Times Picayune Publishing Co. v. United States,* 345 U. S. 594 (1953) at 625.

There is a distinct and different purpose exercised by Congress in the enactment of Section 4 of the Clayton Act, originally Section 7 of the Sherman Act,[1] from the enactments of Section 1 and 2 of the Sherman Act. Section 4 was legislated to prevent personal injury. The private antitrust action thus is not a derivative action but a direct and primary action under which conduct forbidden by the antitrust laws is made redressable as far as Congressional power extends under the commerce clause. *City of Atlanta v. Chattanooga Pipe and Foundry Co.* (6th Cir., 1903) 127 Fed. 23, aff'd 203 U. S. 390 (1906). *U. S.*

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[1]Sec. 7 of the Sherman Act was repealed by Public Law 137, 84th Congress, 1st Session, effective January, 1956. It read as follows: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

v. Addyston Pipe and Steel Co. (6th Cir., 1899) 85 Fed. 271, aff'd 175 U. S. 211 (1899). The only judi ial limitation which may be placed on Section 4 of the Clayton Act, aside from the allegation of forbidden conduct, on a motion to dismiss is whether or not personal injury is cognizable under the complaint. That is not in issue here. In issue here is whether the complaint alleges conduct exempt from the antitrust laws and whether the complaint should set forth matters which show an adverse effect on the public, other than that pleaded.

That the activities of the respondents are not exempt from the antitrust laws is settled in *United States v. International Boxing Club of New York, Inc.*, 348 U. S. 236 (1955); *United States v. Schubert*, 348 U. S. 222 (1955). There it was held that conduct forbidden in the antitrust laws would not be immune though pertaining to athletic contests.

The only judicial limitations on Congress' enactment of the antitrust laws under the commerce power in the general welfare are (1) whether the activities involved are within the reach of Congress' power and (2) whether the conduct or matters alleged are within Congress' purpose as condemned conduct. On the showing of these conditions to his personal injury, the private party has pleaded a cause of action without more. *Mandeville Island Farms, Inc., v. American Crystal Sugar Co.*, 334 U. S. 219 (1948). The public is *ipso facto* harmed on the showing of conduct forbidden in Congress' regulation of the channels of interstate trade and commerce.

The relationship of the petitioner and respondents to interstate trade and commerce is such that his complaint comes directly within the decisions of this Court which have applied Congressional power in private actions, as follows: (1) those made a victim of conduct forbidden by the antitrust laws by an interstate business using the forbidden means are protected by the act. *Moore v. Meads Fine Bread Co.*, 348 U. S. 115 (1955); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 (1927); *Mandeville Island Farms, Inc., v. American Crystal Sugar Co.*, 334 U. S. 219 (1948); (2) the oppression of those who contract in or engage in interstate trade or commerce by an interstate association directly affects interstate trade and commerce by the elimination of the contracts and services offered in interstate trade and commerce. *Binderup v. Pathe Exchange*, 263 U. S. 291 (1923); *Mandeville Island Farms, Inc., v. American Crystal Sugar Co.*, supra; (3) the oppression of a private party pursuant to purposes and aims to eliminate competition in interstate commerce when the direct effect of the activities of the interstate business is to eliminate the private party from association with the alleged competitors who are engaged in interstate commerce directly affects such commerce and raises a cause of action. *Ramsey v. Associated Bill Posters Ass'n*, 260 U. S. 501 (1923); (4) employees are protected against a combination of employers who engage in activities which are part of interstate commerce who seek to blacklist or boycott them. *Anderson v. Shipowners Ass'n of the Pacific*, 272 U. S. 359 (1926); (5) those

who offer services are protected in their right to engage in their gainful occupation under the antitrust laws when sought to be defeated by those in interstate trade and commerce or whose activities affect such trade and commerce. *Gardella v. Chandler* (2nd Cir., 1949), 172 Fed. 2d 402; *Mandeville Island Farms, Inc., v. American Crystal Sugar Co., Inc.*, supra. And see *United States v. National Ass'n of Real Estate Boards*, 339 U. S. 485 (1950); *United States v. Women's Sportswear Mfgrs. Association*, 336 U. S. 460 (1949). The antitrust laws enable the private party to sue for contracts and combinations void at common law and obtain affirmative relief. *U. S. v. Addyston Pipe and Steel Co.* (6th Cir., 1899), 85 Fed. 271; aff'd 175 U. S. 211 (1899); *City of Atlanta v. Chattanooga Pipe and Foundry Co.* (6th Cir., 1903), 127 Fed. 23, aff'd 203 U. S. 390 (1906).

Petitioner's complaint is readily within the antitrust laws. Under his allegations of respondents' attempted domination and control of football, ruination of the All America Conference, and elimination of competition, petitioner has raised his action in the context of a general and overall destruction of competition in the football business. But he need not stop here for his personal sufferings cognizable by reason of the boycott and ban exercised against him and others engaged in interstate trade and commerce are matters well within Congressional power and purpose as determined by the courts. *Moore v. Meads Fine Bread Co.*, supra. Thus the following acts forbidden by the antitrust laws have been pleaded to petitioner's personal suffering: (i) the circulation of

blacklists designed to prevent the employment of petitioner with members of the Pacific Coast League and members of the National Football League who are engaged in interstate commerce; *Eastern States Retail Lumber Dealer's Ass'n et al., v. United States,* 234 U. S. 600 (1914); (ii) the effectuation of a group boycott and ban designed to eliminate petitioner's association with the interstate business of football, and to oppress and ruin his offering of interstate services. *United States v. Frankfort Distilleries, Inc.,* 324 U. S. 293 (1945); *Fashion Originators' Guild v. F. T. C.,* 312 U. S. 457 (1941). The placing of boycotts and bans in the market by those engaged in interstate commerce *ipso facto* burdens interstate trade and defeats Congressional purpose; (iii) the surrender of all individual competition into an association, the National Football League, which regulates employment conditions, and pursuant thereto, blacklists, boycotts and bans players and prevents their rendering their occupation. *Anderson v. Shipowners Ass'n of the Pacific,* 272 U. S. 359 (1926); (iv) The entry into a concerted nationwide plan to oppress petitioner, and subject his business to ruin. *Binderup v. Pathe Exchange,* 263 U. S. 291 (1923); *Fashion Originators' Guild v. F. T. C.,* supra; *United States v. International Boxing Club of N. Y., Inc.,* supra, concerned the denial of free entry to boxers and promoters in the boxing business.

To immunize the injury to petitioner from conduct in violation of the antitrust laws, on a motion to dismiss, is beyond the pronouncements of this Court.

Hart v. B. F. Keith Vaudeville Exch., 262 U. S. 271 (1923); *Binderup v. Pathe Exchange*, supra; *Mandeville Island Farms, Inc., v. American Crystal Sugar Co.*, supra.

VI.

ARGUMENT.

I.

PETITIONER HAS ALLEGED THE PERPETRATION OF CONDUCT CONDEMNED BY CONGRESS TO HIS INJURY.

A. The complaint alleges that the respondents are in interstate commerce, and they have been refused an exemption from antitrust liability from Congress.

Petitioner urges that the decisions in the cases of *U. S. v. International Boxing Club of New York, Inc.*, 348 U. S. 236 (1955), and *U. S. v. Schubert*, 348 U. S. 222 (1955), leave no room for argument that the activities of organized professional football are within the scope of the Sherman Act. The Court below sought to find a distinction between "team sports" and non team sports. But the basis of the decision in the above cases rests not on the type of athletic activity involved, but upon the sound judicial doctrine that the courts cannot exempt business from the exercise of Congress' power in the Sherman Act.

The same considerations which led the Court to refuse to grant boxing an immunity from antitrust prosecution are applicable to the business of football. (1) At the time the complaint in this case was filed, no court had ever held that football was not subject to the antitrust laws. (2) The case of *Hart v. B. F. Keith Vaudeville Exchange*, 262 U. S. 271 (1923),

established that all businesses using interstate facilities would have their activities subject to a hearing on the merits. The *Hart* case has even more significance to this proceeding than the *Boxing* case. For the case was a private action under the antitrust laws, and came to the court on a motion to dismiss. The clear command of Justice Holmes in that case was that no complaint alleging federal jurisdiction should be dismissed under the Sherman Act involving more than frivolous contentions on the grounds of insufficiency of interstate commerce. This decision then was a clear indication to the athletic world that its activities affecting private parties would be subject to a trial on the merits. (3) Congress specifically failed to allow the immunity from antitrust prosecution to football that the Court below seemed to grant. As is stated by the Court in the *International Boxing Club* case, Congress had before it four bills forbidding the application of the antitrust laws "to organized professional sports enterprises or to acts in the conduct of such enterprises" (H.R. 4229, 4230, 4231, and S. 1526, 82d Cong., 2d Sess.) Congress specifically refused to grant football the immunity it has now seemingly been granted. Petitioner urges, it is for Congress and not the courts to grant immunity from antitrust prosecution, and Congress has refused to grant the exemption. This Court has repeatedly admonished this principle, and the decision of the Court below is, it is respectfully submitted, a clear departure from the commands of the Court. *U. S. v. South-Eastern Underwriters Ass'n*, 322 U. S. 533 (1944).

The allegation of the petitioner's complaint certainly raises the jurisdiction of the federal courts over the activities of the business of football. *Hart v. B. F. Keith Vaudeville Exch.*, supra. It is alleged that respondents receive substantial remuneration for interstate broadcasting and televising; that prior to the opening of the football season the various agents of the defendant clubs make contracts with interstate communication media; that these are mutual arrangements by which each club contributes its share to a common venture; that at said time it is agreed and contemplated that the contest of football will include interstate transmission, and that apparatus for interstate transmission will be installed in the ball parks (R. 7-9).

Further, the elements of the uniform adoption of contracts by ten club owners located in ten different cities in the United States, the leasing of ball parks, and the traveling of players and equipment across state lines mark the business of football an interstate business. The National Football League itself is an interstate governing body which received $50,000 from each member located in varying parts of the United States (R. 5). Its rules and regulations are adopted by each club and thus have nationwide application stretching from California to New York (R. 5, 15, 20, 24, 27-28, 35). *United States v. South-Eastern Underwriter's Ass'n*, 322 U. S. 533 (1944); *United States v. Schubert*, supra.

B. The private right of recovery under the antitrust laws is a direct and primary right under which the private party may reach any conduct forbidden by the antitrust laws, as far as Congressional power extends, which has caused injury.

The court below based its decision on two grounds: (1) that it could distill the action of the petitioner into a "derivative right springing from allegations of intent" to "boycott and ruin the All America Conference" (R. 76); and (2) that the matters alleged by petitioner did not show that the "public was adversely affected" (R. 77). As to the first contention, a complaint may not be dismissed if under any state of facts which could be used in support of the claims pleaded, plaintiff would be entitled to relief. *Dutton Co. v. Cities Service Defense Corp.* (8th Cir., 1952), 197 Fed. 2d 458; *J. Walker and Sons v. Tampa Cigar Co.* (5th Cir., 1952), 197 Fed. 2d 72. The complaint is replete with facts which can have no other conceivable effect than that those engaged in interstate business have injured petitioner within the scope of the antitrust laws.

The complaint of petitioner may not be distilled by the court on a motion to dismiss. Every element and statement in the complaint must be supported. The absence of evidential facts does not prevent the party from proving matters which the complaint has generally charged. This is in the spirit of the rules of the Federal Rules of Civil Procedure and the command of this Court. *U. S. v. Employers Plasterers' Association,* 347 U. S. 186, 188 (1954).

> "Whether these charges be called 'allegations of fact' or 'mere conclusions of the pleader' we

hold that they must be taken into account in deciding whether the Government is entitled to have its case tried."

And at 189:

"And where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified."

As to the second contention, that of showing an "adverse public effect" — it is respectfully submitted that the Court below has confused doctrines which relate only to the extent of Congress' power and purposes under the antitrust laws and applied them in a manner not permissible under Section 4 of the Clayton Act. This act, on its face, is not concerned with public harm, but with private injury. There can be no judicial limitations on this section, on a motion to dismiss, apart from the alleging of conduct forbidden by the antitrust laws, other than that personal injury be cognizable in the complaint.

The judiciary by the enactment of the antitrust laws is concerned only with the enforcement of them. This in turn calls for the determination of whether or not the conduct before it is within the reach of Congress under the commerce clause and whether Congress manifested a purpose to condemn it. The doctrine of "adverse public effect" seems to state that the Court is concerned with determining the public effect of conduct even if it violates the antitrust laws. For the Court below did not discuss the allegations of petitioner's complaint which specified illegality under

the antitrust laws. The source of this doctrine is clear, but it is erroneous and has no direct support from this Court. It arises from the discussions of this Court under its interpretation of the commerce clause. Because of the strictness of the early cases construing Congressional power, *United States v. E. C. Knight,* 156 U. S. 1 (1895), the law began to extend Congressional power under the commerce clause by speaking in terms of the "effect" of activities on interstate commerce, as discussed in *Mandeville Island Farms, Inc., v. American Crystal Sugar Co.,* supra. This raised the issue of direct, and later the substantial affect of conduct on interstate commerce. This Court in such discussions thus spoke in the terms of the effect of forbidden conduct in order to sustain manifest Congressional power. *Fedderson Motors, Inc., v. Ward* (10th Cir., 1950), 180 Fed. 2d 519, and the Court below thus erroneously applied this concept which related only to Congressional power to determine the nature of a private antitrust action. Thus it is said that the private action is a derivative action from public harm and not a direct action for personal injuries because the forbidden conduct must affect, not interstate commerce, but the public. This was thought to be fortified by considering the government's action under the antitrust laws which in general, but not of necessity, raises issues of public protection. From this it was said that the private party must allege matters of similar public harm. Yet the pleading of public harm by the government pleader depended solely on the drafter since all that the government need prove is a violation of the

antitrust laws and Congressional power to reach it. Congress, moreover, had distinct and different purposes in enacting Section 4 of the Clayton Act from actions to be enforced by the government. Congress concern in the enactment of the private right of recovery was with personal injury and oppression of the individual. This is told in the Senate debates regarding the enactment of the Sherman Act (20 and 21 Cong. Record Senate Bill No. 3445 (1889); Senate Bill No. 1 (1890)). In Sections 1 and 2 of the Sherman Act the Congress was concerned with the defeat of the public welfare by conduct which threatened to restrain trade and cause personal sufferance. This is not to say, however, that the government action and the private action do not manifest a Congressional purpose to leave no stone unturned in its elimination of forbidden conduct as far as its power extended. For as this Court has held the private action is a part of Congress' antitrust enforcement program. *Lawlor v. National Screen Service,* 349 U. S. 322 (1955). In attempting to stamp out any abuse of the free economy, Congress allowed private actions to be brought, which because of the requirements of private injury, would consequently involve not matters of public protection, but simply matters of personal suffering and injury from conduct forbidden in the antitrust laws. The general welfare was necessarily involved upon the showing of conduct forbidden by Congress and injury therefrom. And now that Congress' full power under the antitrust laws has been determined by this Court to reach injury resulting solely from an interstate combination

using outlawed practices, *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, the question of effect of forbidden conduct on interstate commerce is to be treated in terms of the fact that forbidden conduct has been perpetrated by an interstate business. As such, the question of public harm as used below must be reduced, then, not to a question of Congress' power under the commerce clause, but to an attempt to immunize forbidden conduct from personal injury. But this in turn allows judicial opinion to supplement that which Congress has already legislated. For public injury must occur in the participation in conduct condemned by Congress as harmful to the public. This rests on the historic difference between the function of legislation and the function of judicial enforcement of Constitutional enactments.

In *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, the Court stated at 119:

> "We think the practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. The victim to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies are kept high while the local prices are lowered. If this method of

competition were approved, the pattern for growth of a monopoly would be simple."

The group boycott is illegal per se. *Times Picayune Publishing Co. v. United States,* 345 U.S. 594 (1953), at 625. See also *United States v. Frankfort Distilleries,* 324 U.S. 293 (1945); *Fashion Originators' Guild v. F. T. C.,* 312 U.S. 457 (1941); *Eastern States Retail Lumber Ass'n v. United States,* 234 U.S. 600 (1914) (Blacklists circulated to induce marketing arrangements held unlawful).

Consequently confederates in a boycott and ban are engaging in outlawed competitive practices and if they be interstate businesses they are within the scope of the Sherman Act. This is so even though the forbidden practices be directed against a local merchant and no interstate transactions are used to destroy him. The fact that petitioner here is not a competitor in the strict sense but one whose job opportunities were dependent on observation by respondents of the antitrust laws is not significant. *Roseland v. Phister,* (7th Cir., 1942), 125 Fed 2d 417. He has been oppressed within the meaning and intention of the antitrust laws. Manifestly if this Court was concerned with the effect of the Moore Bread Co.'s conduct on the public it would have been forced to find little or no effect. For it was concerned only with the sale of bread in Santa Rosa, New Mexico, and, at that, the defendant was offering a lower price for its bread as a result of the forbidden conduct. Thus the Court has recently all but eliminated any judicial concern for the effect of conduct on interstate commerce, and

has held that conduct forbidden by the antitrust laws and engaged in by an interstate business is actionable by a private party even though the conduct be retaliatory.

So it is that petitioner's action is a direct and primary right to recover damages for his personal injury from those who engage in conduct forbidden by the antitrust laws. He need allege only two matters to support his action; (1) a violation of the antitrust laws and (2) injury arising from the violation.

Section 4 of the Clayton Act states:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . . ."

On its face the section calls for the prima facie right of action only if a person shall be injured by reason of anything forbidden in the antitrust laws. As was stated by Senator Sherman, 21 Cong. Record, Part III, 2456:

> "These two sections are *distinct* and *different* in their *scope* and *object*. The first invokes the power of the national government, in proper cases, to restrain such a combination by mandatory proceedings from interfering with trade and commerce of the country, and the second section is to give private parties a remedy *for personal injury* caused by such a combination."[1] (Emphasis added).

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[1]At this time Senator Sherman was speaking of the first draft of Senate Bill No. 1, introduced December 5, 1889. Section 2 then provided for private right of action and double damages.

The act accordingly was soon interpreted by the Courts to declare a direct and primary right to the private party not dependent on any public injury. If harm befell the individual from a violation of the law, his right to sue was enforced.

In 1907 the 3d circuit stated in *Wheeler Stenzel Co. v. Nat'l Window Glass Jobbers Ass'n,* 152 Fed. 864, 874, to wit:

> "It is manifestly the correct understanding of the seventh section of the act that where a man is harmed in his business or property by a violation of the act, he has suffered a legal injury and is entitled to his action therefor."

And the First Circuit in *Albert Peck Barth Co. v. Mitchell Woodbury Corp.,* 57 Fed. 2d 96, in 1932 stated:

> "To constitute an offense under Section 1 of the Sherman Act, it is not necessary, if a conspiracy is proven, the purpose and intent of which was to eliminate by unfair means a competitor in interstate commerce, to show the public was affected and to what extent."

And in *Monarch Tobacco Works v. American Tobacco Co.,* the Circuit Court in Kentucky stated in 1908, 165 Fed. 774, 777:

> "All that is necessary to support the action is that business or property of the complainant shall have been in some way injured by reason of the illegal scheme."

The Court in *City of Atlanta v. Chattanooga Pipe and Foundry Co.,* (6th Cir., 1903), 127 Fed. 23, aff'd 203 U.S. 390 (1906), has set forth perhaps the most

cogent interpretation of Section 4 of the Clayton Act, then embodied as Section 7 of the Sherman Act. At 127 Fed. 23, 27 the Court stated:

> "That such a plaintiff is entitled to recover the damages thus sustained in his business, whatever its character, would seem to be the plain purpose of the seventh section of the law of Congress, under the logic of the decision in Addyston Pipe Co. v. United States. It is possible to so construe this seventh section as to devitalize this section by confining compensatory relief to such persons as shall sustain an injury in some interstate business whose volume or profit has been diminished. But this construction does not seem consistent with the wide economic purposes of Congress, as manifested by the whole tenor of the act. Congress evidently foresaw the wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to encourage disregard of the law. The act gives the remedy to 'any person' 'injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act.' If Congress had the power to declare unlawful a combination which was intended to restrain interstate commerce by enhancing the value of a commodity when the subject of interstate commerce, it had the power to give a compensatory remedy to any person directly affected by the unlawful agreement."

And at 28-29, the Court stated:

> ". . . The seventh section alone gives any remedy to one injured by such a forbidden combination

or contract, and that measures the relief by the 'damages by him sustained,' costs of suit, and his reasonable attorney's fees. The remedy is not given to the public, for no one may bring the action save the person 'who shall be injured,' etc., and the recovery is for the sole benefit of the person so injured and suing."

Justice Holmes in *City of Atlanta v. Chattanooga Pipe and Foundry Co.*, 203 U.S. 390 (1906), 397 said:

"In other words, if Congress had the power to make acts illegal, it could authorize recovery for damages, although the latter was suffered wholly within the boundaries of one state."

Private antitrust action always raises a public harm as long as it is concerned with matters forbidden by Congress and personal injury. The public interest in personal injury is the concern of Congress and not the judiciary.

C. The complaint sets forth matters forbidden by Congress to petitioner's injury which raise the powers and purposes of the Congress.

1. Allegations of monopolization by respondents and the ruination of competitive leagues effecting boycotting and ban raise a cause of action to one who is so injured as part of the illegal plan.

Petitioner's complaint may not be distilled on a motion to dismiss and it is submitted that the petitioner has pleaded sufficient facts from which it can be proved that he was injured by the respondents from acts connected with their illegal attempt to monopolize the football industry, destroy competition and ruin competitive leagues (R. 9, 14, 16). It cannot be assumed or argued that respondents have acted

in a manner inconsistent with this purpose. The complaint specified that the program of the respondents was to control and monopolize the business of football (R. 9-10). Such a purpose and plan is, of course, illegal. *U. S. v. Associated Press*, 326 U.S. 1 (1945); *Fashion Originators' Guild v. F. T. C.*, 312 U. S. 457 (1941); *Paramount Famous Lasky Corporation v. U. S.*, 282 U. S. 30 (1930); *U. S. v. First National Pictures, Inc.*, 282 U. S. 44 (1930). *U. S. v. American Medical Association*, (D.C. Cir., 1942), 130 Fed. 2d 233, affirmed, 317 U. S. 519 (1943).

Mere statements of just cause or benevolent purpose cannot decide the fact of whether respondents did, in fact, have as their purpose the domination of the interstate business of football and the interstate communication of football contests. As was stated by the Circuit Court in *U. S. v. American Medical Association*, (D. C. Cir., 1942), 130 Fed. 2d 233, at 249:

> "Neither the fact that the conspiracy may be intended to promote the public welfare, or that of the industry, nor the fact that it is designed to eliminate unfair, fraudulent and unlawful practices, is sufficient to avoid penalties of the Sherman Act."

Thus respondents, it must be assumed, attempted to control an interstate business and attain monopoly over the contests which are part and parcel of interstate transmission and communication.

Whether or not the means alleged are innocent of themselves, they are unlawful if part of a plan to

monopolize. *U. S. v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948); *Schine Chain Theatres, Inc. v. U. S.*, 334 U. S. 110 (1948); *U. S. v. Griffith*, 334 U. S. 100 (1948); *U. S. v. Corn Products Refining Co.*, (S. D. N. Y. 1916), 234 Fed. 964.

Persons who are cut off from their business or trade by those attempting to monopolize interstate trade and commerce have a private cause of action under Section 4 of the Clayton Act. *Eastman Kodak Co. of N. Y. v. Southern Photo Materials Co.*, 273 U.S. 349 (1927); *Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U. S. 251 (1946); *Roseland v. Phister Mfg. Co.*, (7th Cir., 1942) 125 Fed. 2d 417. See also *Greenleaf v. Brunswick-Balke-Collender Co.*, (D. C. Pa. 1947), 79 Fed. Supp. 362. (Refusal to allow billiard player participation in championship billiard contest held actionable under Section 4 of the Clayton Act).

The boycott involved in petitioner's complaint arose after petitioner had played football with the All America Conference (R. 12-14). It is alleged in the context of a purpose to ruin the All America Conference (R. 14). The boycott was imposed by threats against the Pacific Coast League (R. 15). These allegations specify activities directly affecting interstate commerce since they involve those engaged in interstate trade and commerce. When viewed as part of a plan to monopolize the football industry, the boycott and ban engaged in by respondents are clearly within the power of Congress and its condemnation. Further, *United States v. International Boxing Club of New York Inc.* necessarily decides the power of

Congress over these matters, and its purpose to allow free access in the athletic business.

It is not sufficient under the general allegations of this complaint to assume that the boycott against petitioner was applied only against him and therefore its exercise had little or no effect on interstate commerce, to use traditional interstate commerce language. For the power and purpose manifested against petitioner was a demonstration of ruthless conduct which would be exercised by respondents if anyone attempted to interfere with their alleged attempts to dominate and control the business of football. Its use put the Court on notice that the respondents were engaging in conduct consistent only with a purpose and intent to monopolize. As stated in *United States v. Swift,* 286 U. S. 106 (1932) 116:

> "... size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."

2. Allegations of injury arising from the concerted union of employers to boycott petitioner, the coercion exercised against the Pacific Coast League and the ban on petitioner's services directly affected the free flow of interstate trade and commerce and set forth a cause of action.

As a further ground for the enforcement of Congress' power under the antitrust laws, the allegations of petitioner's complaint which alleges that respondents have blacklisted and boycotted him, under a nationwide system of player regulation have raised a cause of action (R. 10, 13, 16). It is contrary to Congressional purposes that employers be allowed to

combine to fix the wages of employees and blacklist and ban them pursuant to combined action. Injury resulting from this concerted activity has been held to state a cause of action under the antitrust laws.

In *Anderson v. Shipowners Ass'n of the Pacific,* 272 U. S. 359 (1926) this Court was concerned with an association of employers engaged in the shipping business to fix the wages of seamen, assign them to particular vessels and blacklist those who did not comply with the association's rules. On a motion to dismiss a seaman's private antitrust action for alleged blacklisting, the Court held a cause of action was stated.

The Court, after citing the case of *United States v. Colgate,* 250 U. S. 300, 307 that

> "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of the rights of those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade."

stated at 363:

> "That the effect of the combination now under consideration, both as to the seamen and the owners, is precisely what this language condemns is made plain by the allegations of the bill we have just summarized."

Petitioner's injury cognizable under the complaint then must be enforced on the grounds that the boycott and ban exercised against him was pursuant to the combined exertion by respondents of nationwide

player regulations. This is admitted as to the blacklist, (R. 30, 35) where the respondents admit that pursuant to the rules of the National Football League petitioner was automatically suspended from playing football with them for five years. And apart from the fact that these penalties were imposed by a combination of separate club owners in interstate commerce, they directly affected interstate commerce by preventing petitioner from utilizing his services in the Pacific Coast League and the National Football League. They prevented member clubs from accepting his offer. The commerce power extends to services as well as goods and unreasonable restraints imposed against them are equally condemned. *United States v. National Association of Real Estate Boards,* 339 U. S. 485 (1950) at 491. Thus Congressional purposes in maintaining the free flow of interstate commerce are defeated when individuals associate themselves into a plan which prevents the entry and access of services into this flow of commerce.

So it is also that all of petitioner's relations to the interstate game of football was severed by respondents' conduct.

They have eliminated petitioner from the business of football (R. 16); and with it his contracts with the business, his interstate traveling, his participation in interstate communication. Thus petitioner has directly raised the conditions analyzed by this Court in *Binderup v. Pathe Exchange,* 263 U. S. 291 (1923). This was an action by a motion picture exhibitor and distributor against a combination of distributors who

induced his suppliers to refuse to deal with him in an effort to destroy his business. The destruction of the private party was held to *ipso facto* destroy interstate trade. At 312 the Court stated:

> "The contracts with these distributors contemplated and provided for transactions in interstate commerce. The business which was done under them—leasing, transportation, and delivery of films—was interstate commerce. The alleged purpose and direct effect of the combination and conspiracy was to put an end to these contracts and future business of the same character and 'restricts, in that regard, the liberty of the trader to engage in business' (Loewe v. Lawlor, 208 U.S. 274, 293, 28 Sup Ct. 301, 303 [52 L.Ed 488, 13 Ann.Cas 815]) and, as a necessary corollary, to restrain interstate trade and commerce in violation of the Anti-Trust Act."

3. Allegations of boycotting and ban show oppression of the private party. Such oppression is actionable under the antitrust laws since a common law boycott exercised by a combination in interstate trade and commerce is within the powers of Congress and condemned.

Petitioner here assumes that there is only involved in his complaint the mere doing of acts per se in violation of the antitrust laws which have suppressed his freedom to engage in his trade by an interstate combination. It is clear that even in this context the allegations of the boycott and ban directed at petitioner are within the scope of the Sherman Act. Congressional purpose is particularly concerned with the oppression of the individual by combinations engaged in acts forbidden by the antitrust laws. See, in this connection L. Hand's discussion in *United States*

v. Aluminum Co. of America (2nd Cir., 1945), 148 Fed. 2d 416, at 428-429. At this point the power of Congress reaches every activity engaged in by an interstate combination with this end. For the oppression of the individual and the driving out of worthy men from the industry by concerted activity is as much a concern of the antitrust laws as are agreements to fix prices. *Fashion Originators' Guild v. F. T. C.*, 312 U. S. 457 (1941), at 466. *Binderup v. Pathe Exchange*, supra. *Ramsey v. Associated Bill Posters*, 260 U. S. 501 (1923). The doing of these acts by an interstate combination *ipso facto* raises the judicial enforcement of the antitrust laws. *Moore v. Mead's Fine Bread Co.*, supra; *Gardella v. Chandler* (2nd Cir., 1949), 172 Fed. 2d 402.

It was the purpose of the antitrust act to condemn all restraints of trade known at common law and to give an affirmative action for compensation to those injured by the perpetration of such restraints. Such actions were to be brought into the federal Courts because of the accessibility of the defendants to federal process.

Thus a purpose of the antitrust laws was to allow a redress for damages from boycotts and bans which were unlawful restraints of trade at common law.

As was stated in *U. S. v. Addyston Pipe and Steel Co.*, 85 Fed. 271 (6th Cir., 1899), 279, affirmed, 175 U. S. 211:

> "Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a

civil action for damages in favor of one prejudicially affected thereby, but were simply void and were not enforced by the court. Mogul Steamship Co. v. McGregor, Gow and Co. [1892] App. Cas. 25; Horby v. Close, LR 2 Q.B. 153, Lord Campbell, C. J. in Hilton v. Eckersly, 6 El and Bl 47, 66; Hannen, J. in Ferrer v. Close, LR 4 Q.B. 602, 612. The effect of the act of 1890 is to render *such contracts unlawful in the affirmative and positive sense, and punishable as a misdemeanor, and to create a civil right of action for damages in favor of those injured thereby;* and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance of such trade restraints." (Emphasis added).

Hilton v. Eckersly, 6 El and Bl 47, aff'd 6 El and Bl 66, cited in the *Addyston* case, supra, at 290, involved a combination of employers who attempted to control and discipline employees. This was held in restraint of trade. For additional common law treatment of boycotting and blacklisting as restraints of trade see especially *Mineral Water Bottle Exch., etc. v. Booth,* 36 Ch. D. 465 (1887); and the treatment of employer boycotts and blacklisting as contrary to the common law in the United States; *Huston v. Rentlinger,* 91 Ky. 333, 15 S.W. 867 (1891); *Mattison v. Lake Shore and M. S. Ry. Co.,* 3 Ohio Dec. 526 (1895); *Blumenthal v. Shaw,* (3rd Cir., 1897), 77 Fed. 954. See also Restatement of Contracts Sec. 515(c), Illustrations 20-22. These cases thus establish the illegality of employers in ending their independent competition to combine and conspire to blacklist, boycott and

ban employees from engaging in their occupation. They are restraints of trade and cognizable under the antitrust act. *Gardella v. Chandler*, supra, where Judge Hand stated at 408:

> "Be that as it may, whatever other conduct the Acts may forbid, they certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest of these is a contract which unreasonably forbids anyone to practice his calling."

Petitioner's action is thus well within any theory of antitrust liability; whether judicial attention be focused on Congress' concern over interstate commerce or over injury to individuals. The only possibilities of judicial limitation of petitioner's action, construction of Congressional constitutional power over interstate commerce and construction of Congressional purposes, have been met. In engaging in conduct forbidden by the antitrust laws, respondents have brought the condemnation of Congress and raised a treble damage action. The opinion of the Court below, it is respectfully submitted, has immunized conduct without foundation, and in defeat of actual Congressional purposes. Respondents had the express opportunity for Congress to protect them from antitrust actions which would inevitably result when they took the law into their own hands. But Congress failed to grant the immunity.

The only manner in which those may escape the inevitable condemnation of activity in violation of

the antitrust laws which in itself restrains trade and commerce is to assert that their activity produces no matters of consequence to the public. It is this that the doctrine of "adverse public affect" really stands for. As such, the Courts have, it is respectfully submitted, entered into the realm of legislation reserved for Congress only. For the courts have no authority under the antitrust laws to determine whether or not conduct it finds forbidden by Congress should escape the consequences the act imposes. *United States v. South-Eastern Underwriters Ass'n,* 322 U. S. 533 (1943).

The doctrine of "adverse public effect" sets sail into a sea of doubt under which the Courts may apply differing notion of what each considers the public effect of conduct it must find forbidden by the antitrust act. Its vagueness and uncertainty alone show its inapplicability to judicial enforcement of the antitrust laws. Judge Taft in *United States v. Addyston Pipe and Steel Co.* (6th Cir., 1898), 85 Fed. 271 at 283-284 warned:

> "It is true that there are some cases in which the courts mistaking, as we conceive, the proper limits of relaxation of the rules for determining the unreasonableness of the restraint of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest and how much is not. The manifest danger in the administration of justice according to so shifting, vague and indetermined

standard would seem to be a strong reason against adopting it."

Petitioner has alleged a group boycott and ban which are per se forbidden by the antitrust laws. Such conduct in this complaint is manifestly cognizable under the antitrust laws. For it is alleged to be used by those engaged in interstate trade and commerce and whose activities directly affect such commerce. They are alleged in the context of a purpose of controlling the business of football. The boycott and ban, coming as it did, after petitioner had played with a competitive football league, the All America Conference is entirely consistent with such intent to dominate and control. Further, the boycott and ban employed by respondents were directly in or affected interstate commerce since they were effectuated and imposed on individual businesses in interstate commerce by an interstate association. The boycott terminated petitioner's offer of services to interstate businesses, the members of the National Football League and the San Francisco Clippers, with activities in interstate commerce and association with interstate communication media. The ban severed petitioner's connection with interstate business and with these media, and stopped the use of his services in the channels of interstate trade and commerce.

Petitioner's action is a direct and primary right arising from his personal injury. It involves the general welfare in the form of defeating forbidden conduct and redressing personal injury thereby. Re-

straints on the freedom of access and entry into athletic contests is a matter of Congressional purpose as was decided in the *Boxing* case. Granted allegations of Congressional power and allegations stating conduct forbidden by the antitrust laws, petitioner's action is well pleaded without more.

VII.

CONCLUSION.

For the foregoing reasons the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed and petitioner's action be reinstated.

Dated, San Francisco, California,
November 19, 1956

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